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No. 08-447

Supreme Court, U.S.
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In The

Supreme Court of the United States

LEROY BACA,

Petitioner,

v.

S. A. THOMAS and E. P. GIPSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit properly dismissed petitioner's 28 U.S.C. Section 1292(b) interlocutory appeal of the district court's summary judgment order that petitioner's custom and practice of arbitrary, forced floor-sleeping at the Los Angeles County Sheriff's Department ("LASD") Jail, in the context of overcrowding, is unconstitutional and in violation of the Eighth Amendment and the Fourteenth Amendment Due Process Clause.

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STATEMENT OF THE CASE

This is a Section 1983 class action for damages brought by respondents S. A. Thomas ("Thomas") and E. L. Gipson ("Gipson"), based on petitioner Sheriff Baca's ("Baca") custom and practice under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), of forcing inmates at the Los Angeles County Sheriff's Department ("LASD") Jail to sleep on the floor in the context of overcrowding. Only petitioner, Sheriff Baca in his official capacity remains as a defendant in this action. The instant action was filed in the Fall of 2004. Class certification was made on May 17, 2005. Pet.App. 3. The dates of class membership were limited and ran from December 18, 2002 through May 17, 2004. Additionally, a tolling provision provided that "[i]ndividuals forced to sleep on the floor 'between December 18, 2000 and December 17, 2002, and who remained in prison until at least December 18, 2002 are also included in the class.'" Pet.App. 3.

The class action was certified by the district court under Fed. R. Civ. P. Rule 23(b)(3) on May 17, 2005. In its September 21, 2007 order the district court held floor sleeping at the LASD Jail unconstitutional under the Eighth Amendment and the Fourteenth Amendment due process clause, thereby finding floor-sleeping unconstitutional both as to convicted prisoners and pretrial detainees. Pet.App. 2-45.

On January 11, 2008, the district court issued an order granting application for certification of

interlocutory appeal under 28 U.S.C. § 1292(b). Subsequently, on April 16, 2008, the Ninth Circuit denied petitioner's request for permission to appeal pursuant to § 1292(b), Pet.App.1, and on May 20, 2008, further denied petitioner's motion for reconsideration *en banc* of the panel's April 16, 2008 Order. Pet.App. 46.

Petitioner mischaracterizes the district court's ruling that respondent's custom and practice of causing inmates to sleep on the floor during the class period was unconstitutional, by repeatedly asserting that the district court held that "'floor-sleeping' is *per se* unconstitutional" (Br. 9), when it did no such thing. Rather, what the district court ***actually*** ruled was that petitioner's "practice of forced floor-sleeping [is] . . . one of the unconstitutional effects of prison overcrowding." Pet.App. 33. The district court did not hold that all floor-sleeping under all circumstances is *per se* unconstitutional. Rather, its conclusion that floor-sleeping at the LASD Jail was unconstitutional was a fact-based decision that rested upon a number of factors, including deposition transcripts of Jail officials, the sworn testimony of both respondents in depositions and a declaration and upon court-ordered record-keeping that established that during the four-month period during which records of floor-sleeping were kept by the LASD Jail itself, there were more than 24,000 instances of floor-sleeping at the Jail. Pet.App. 9-10, 33.

Holding floor-sleeping unconstitutional during riots, or a fire or some other exigency in a jail or prison facility clearly might rise to the level of *per se*

unconstitutional floor-sleeping, but that was not what the district court held to be the case at the LASD Jail during the class period. Floor-sleeping was not a temporary event at the LASD Jail during the class period. Instead it had become an institutionalized norm in overcrowded LASD Jail facilities, as the figures show during the brief time that petitioner was forced to keep court-ordered records of floor-sleeping. Pet.App. 13. Floor-sleeping at the LASD Jail, pursuant to petitioner's policy and practice, was not "reasonably related to a legitimate goal," *Bell v. Wolfish,* 441 U.S. 520, 538-39 (1979). Nor should the question in this case be the "degree of flexibility jail officials are to be afforded in addressing the consistent problem of overcrowding," (Br. 24), a statement seriously at odds with the petitioner's contention throughout his brief that floor-sleeping at the LASD Jail is at most "temporary." Rather, floor-sleeping at the LASD Jail was "arbitrary and purposeless," *ibid,* and certainly, as it pertains to floor-sleeping, petitioner is not entitled to "wide-ranging deference in the adoption and executions of policies and practices in the jails." *Id.* at 548. (Br. 24).

All that petitioner requests is that this Court summarily reverse the Ninth Circuit's order denying permission to bring an interlocutory appeal under 28 U.S.C. § 1292(b). However, because the court below almost certainly would rule in accordance with Ninth Circuit precedent, *see infra,* it would affirm the district court's holding that the petitioner's custom and practice of arbitrary, forced floor-sleeping in the

context of overcrowding in the jail setting was unconstitutional and in violation of the Eighth Amendment and the Fourteenth Amendment Due Process Clause. It was within its discretion for the court below to refuse to entertain the petitioner's § 1292(b) interlocutory appeal, and the petition for certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT'S SUMMARY ADJUDICATION ORDER RELIED ON CONTROLLING NINTH CIRCUIT LAW IN DECIDING THE ISSUE OF WHETHER OR NOT FLOOR-SLEEPING WITHIN THE LASD JAIL SYSTEM CONSTITUTED A CONSTITUTIONAL VIOLATION.

In its carefully reasoned and considered summary adjudication order, Pet.App. 2-45, the district court expressly relied on long-established Ninth Circuit law that conclusively established that forced floor-sleeping caused by jail or prison overcrowding is unconstitutional. Citing *Hoptowit v. Ray,* 682 F.2d 1237, 1248-49 (9th Cir. 1981), *reh'g and reh'g en banc denied* (1982), the court below held that:

> the practice of forced floor-sleeping [is] . . . one of the unconstitutional effects of overcrowding. . . . [in that] overcrowding "may dilute other constitutionally required services such that they fall below minimum Eighth Amendment standards, and it may reach a

> level at which the shelter of the inmates is unfit for human habitation." Forcing inmates to sleep on the floor stoops to that unconstitutional level.

Pet.App. 33. The court below also noted that while it did ***not*** subscribe to

> an interpretation of the Eighth Amendment that protects only inmates who have suffered some external, physical harm as a result of floor-sleeping. . . . Nevertheless, the Court cannot help but note that Plaintiffs in this case ***have*** presented evidence that they suffered significant external harm from the filthy conditions in which they were required to sleep on the floor, including back pain requiring medical treatment, coughing from dust and grime, staphylococcus infections, exposure to leaking sewage, and exposure to cockroaches and vermin.

Pet.App. 33-34, n. 12. That the district court's ruling was specifically aimed at preventing arbitrary, forced floor-sleeping in the context of jail overcrowding is made plain by the court's repudiation of petitioner's implied argument that "floor-sleeping furthers an economic interest in housing more inmates without expending the resources necessary to increase the number of available beds." Pet.App. 35. As the district court put it:

> The Court cannot abide by such a rule. Allowing a cost defense to neutralize constitutional requirements would permit jails to maintain the most objectively abhorrent and

> inhumane conditions simply because eliminating them would require additional resources.

Pet.App. 35-36.

Importantly, the district court based its decision on prior controlling Ninth Circuit law, *e.g.*, *Rutherford v. Pitches,* 457 F.Supp. 104 (C.D. Cal. 1978), *aff'd in part and rev'd in part on other grounds,* 710 F.2d 572 (9th Cir. 1983), *rev'd sub nom, Block v. Rutherford,* 468 U.S. 576 (1984), and *Thompson v. City of Los Angeles,* 885 F.2d 1439 (9th Cir. 1989) (appropriate to presume County maintained a custom of unconstitutional jail conditions in the form of a shortage of beds because "[i]t is a bedrock common law principle that in certain situations, once a condition has been proven to exist, it is presumed in the absence of proof to the contrary that the condition has remained unchanged. 2 J. Wigmore, Wigmore on Evidence § 437 (J. Chadbourn rev. 1979)"). *Id.* at 1449. In fact, both cases uncontrovertibly established that floor-sleeping, with or without a mattress, constitutes a cognizable constitutional claim.

Petitioner's contention to the contrary, ample authority exists within the Ninth Circuit, finding unconstitutional the practice of causing inmates to sleep on the floor. *See Martino v. Carey,* 563 F.Supp. 984, 1002 (D. Or. 1983) (floor-sleeping caused by overcrowding held unconstitutional *both as to detainees and convicted prisoners*); *Stewart v. Gates,* 450 F.Supp. 583, 588 (C.D. Cal. 1978) ("basic concepts of

decency, as well as reasonable respect for constitutional rights, require that [each inmate] be provided a bed").

Petitioner goes far afield to find cases that seemingly are at odds with Ninth Circuit precedent. The Ninth Circuit case, *Hernandez v. Denton,* 861 F.2d 1421 (9th Cir. 1988),[1] cited by petitioner for the proposition that floor-sleeping is insufficient to state an Eighth Amendment violation, is "red-flagged" and is not good law. The *Hernandez* case involved a *pro se* plaintiff whose fanciful complaint that he was raped by prison officials was dismissed as frivolous by the Ninth Circuit, but that decision subsequently was reversed by the Supreme Court in *Hernandez v. Denton,* 493 U.S. 801 (1989). The fact that the Ninth Circuit in *Hernandez* dismissed without leave to amend, the *pro se* plaintiff's claim that he had to sleep for a single night without a mattress, 861 F.2d at 1424, has less than nothing to do with floor-sleeping caused by overcrowding. To describe the *Hernandez* case as constituting "the gap in the law

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[1] The *Hernandez* case has a long and troubled history, in which floor-sleeping due to overcrowding played no part at all. *See Hernandez v Denton,* 861 F.2d 1421 (9th Cir. 1988), *cert. granted, judgment vacated by Denton v. Hernandez,* 493 U.S. 801 (1989), *on remand, Hernandez v. Denton,* 919 F.2d 573 (9th Cir. 1990), *opinion amended and superseded, Hernandez v. Denton,* 929 F.2d 1374 (9th Cir. 1990), *reh'g denied* (1991), *cert. granted, Denton v. Hernandez,* 502 U.S. 937 (1991), *judgment vacated, Denton v. Hernandez,* 504 U.S. 25 (1992), *on remand, Hernandez v. Denton,* 966 F.2d 533 (9th Cir. 1992).

within the Ninth Circuit," (Br. 20), is at best overreaching, at worst, ludicrous. Another case cited by petitioner, *Allen v. City and County of Honolulu,* 816 F.Supp. 1501 (D. Hawaii 1993), also has nothing to do with floor-sleeping caused by overcrowding. *Allen* was a case that involved a *pro se* prisoner's right to safety, in which the *pro se* prisoner claimed that his cellmate had forced him to sleep on the floor with a mattress and had intimidated the plaintiff into giving him the pork and beef that was served with plaintiff's meals, which the plaintiff in any event did not eat for religious reasons. In *Allen* the court cited the primary out-of-circuit case that has caused a circuit split with respect to floor-sleeping in the context of overcrowded jails or prisons, *Hamm v. DeKalb County,* 774 F.2d 1567, 1575 (11th Cir. 1985), *cert. denied,* 475 U.S. 1096 (1986), in ruling that requiring an inmate to sleep on the floor, by itself, does not constitute a constitutional violation. Relying on *Hamm,* the district court thereby was able to conclude that, because it was not clearly established that intimidation and threats by other inmates that do not result in any actual injury state a constitutional violation, the defendants were entitled to qualified immunity. *Allen,* 774 F.2d at 1505. This is a far cry from the institutionalized practice of arbitrary, forced floor-sleeping due to overcrowding adopted by the petitioner for economic reasons. In *Ramirez v. City, County of San Francisco,* 1997 WL 33013 (N.D. Cal. 1997), a case alleging that numerous conditions of confinement violated the pretrial detainee plaintiff's constitutional rights, the only evidence that plaintiff

provided with respect to floor-sleeping was that he himself had to sleep on the floor for three nights. Moreover, unlike the petitioner, who during the class period kept no records of floor-sleeping and merely ignored the problem, hoping it would go away, in *Ramirez* the defendants' efforts included

> use of available space at other facilities; early release of sentenced prisoners; expanded use of jail alternatives; and authorizing supplemental jail funding. Defendant [Sheriff] Hennessey also responded personally to plaintiff's complaints during his incarceration, expressing concern over the situation, and describing his efforts to improve it. (Pl. Dep. at 16.) In another case involving CJ2 (93-2395-WHO), Judge Orrick found that Sheriff Hennessey has "taken every available step open to him in addressing crowding in the San Francisco County jail.

Id. at *4.

More to the point is *Balla v. Board of Corrections,* 656 F.Supp. 1108, 1118 (D. Idaho 1987) (*"Balla II"*), *overruled on other grounds, aff'd in pertinent part, Balla v. Idaho State Bd. of Corrections,* 869 F.2d 461 (9th Cir. 1989). In *Balla II*, the Court held that floor-sleeping was unconstitutional under the Eighth Amendment, stating:

> It is constitutionally prohibited, under the circumstances, for inmates to be housed ***at any time*** in day rooms or other non-designed

> cell areas or ***to be forced to sleep on mattresses on the floor***. *See Fischer v. Winter,* 564 F.Supp. 281 (N.D. Calif. 1983); *Battle v. Anderson,* 447 F.Supp. 516, 525 (E.D. Okla.), *aff'd,* 564 F.2d 388 (10th Cir. 1977). The court does conclude that these constitutional prohibitions be adhered to at all times.

Ibid. (emphases added).

Indeed, as recently as 2005, in *Balla v. Idaho Bd. of Corrections,* 2005 WL 2403817 (D. Idaho 2005) (*"Balla III"*), the court refused to terminate the injunctions established under *Balla I* and *Balla II*, following the defendants' motion to terminate the injunctions pursuant to the procedure set forth in the Prison Litigation Reform Act (PLRA), 18 U.S.C.A. § 3626(b)(1) and (2). In *Balla III*, the court held:

> **IT IS FURTHER HEREBY ORDERED** that no more than two (2) inmates be housed in any cell for any period of time at any time and that ***no inmates be housed at any time in day rooms or other non-designed cell areas or forced to sleep on mattresses on the floor***. This order shall take effect immediately.

Id. at *12 (emphasis added). Thus, there is absolutely no basis for the petitioner's assertion that the issue of floor-sleeping remains unsettled in the Ninth Circuit. (Br. 10).

II. THE DISTRICT COURT CORRECTLY HELD THAT BACA'S CUSTOM AND PRACTICE OF CAUSING INMATES TO SLEEP ON THE FLOOR AT LASD JAIL FACILITIES IS UNCONSTITUTIONAL AND VIOLATES THE EIGHTH AMENDMENT AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

Petitioner dwells at length on the size of the LASD Jail, and admits that "like many jail and prison systems nationally, the [LASD Jail is] plagued with overcrowding." (Br. 7). Overcrowding, in fact, as petitioner admits is the root cause of floor-sleeping at the LASD Jail. *See Hoptowit,* 682 F.2d at 1248-49:

> Overcrowding itself is not a violation of the Eighth Amendment. It can, under certain circumstances, result in specific effects which can form the basis for an Eighth Amendment violation. Overcrowding can cause increased violence, *see Wolfish v. Levi, supra,* 573 F.2d at 127, it may dilute other constitutionally required services such that they fall below the minimum Eighth Amendment standards, and it may reach a level at which the shelter of the inmates is unfit for human habitation.

In this certified class action for damages, the district court found that the respondents Thomas and Gipson, had experienced floor-sleeping at the LASD Jail that was typical of the absent class members. Rather than the "clean, dry, well lit area, with adequate bedding (such as mattresses and blankets) and space," (Br. 7), euphemistically extolled by petitioner,

respondent Gipson's floor-sleeping experience during 2004 at Men's Central Jail, the main LASD Jail facility, was more representative of floor-sleeping as it occurred at the LASD Jail during the class period. Mr. Gipson, a pretrial detainee, Pet.App. 21-22, described one of his experiences of floor-sleeping during the year 2004, as follows:

> THE WITNESS: Okay. The cell is about 6 feet by 12 feet, I guess, or 8 feet by 12. It has six bunks and a toilet. And I had to sleep on the floor in that cell on a wet mattress that was by the toilet.

Pet.App. 23.

During processing into the Jail in 2004, Mr. Gipson spent approximately 48 hours in a holding cell with as many as 200 other inmates. The holding cell had twenty benches, each of which seated ten people, but there was nowhere to sleep except on the floor. Pet.App. 22. Mr. Gipson then was removed to a second cell that was "maybe 10 by 20 . . . [where there were] people laying down like snakes huddled all up together trying to get rest because they're tired from being up for 48 hours or whatever." *Ibid.* Mr. Gipson spent another day or two in a similar cell again without a bunk, and when finally moved into a Jail module, "he was assigned to a day room without a bunk on which to sleep," and where the only space available for him to place his mattress was directly under the staircase. *Ibid.* On yet another occasion in 2004, Mr. Gipson and 60 other inmates were required to sleep on the floor of a Jail shower. Pet.App. 23.

Mr. Gipson graphically described the conditions under which he was forced to sleep on the floor:

> [Plaintiffs' Counsel]: What conditions [in the jail] are you talking about?
>
> . . . .
>
> THE WITNESS: Okay. Five days of processing, . . . just sitting on benches until you fall off into – you're just so tired, you lay on the floor and you just wait and wait and wait. And you're laying down with – packed on the floor, cement, cold, with no blanket, nothing . . . and it's just 40 men in a 10-man day tank.
>
> [Plaintiffs' Counsel]: What about at night?
>
> THE WITNESS: It didn't matter if it was – you didn't know if it was day or night. It just didn't matter. You were just there until you fall out. And you have to rest. So you end up on the floor with 30 other guys . . . until you said you're not going to lay down on the floor, but you just don't have a choice. You know, that breaks you. It makes you feel bad.
>
> Q. How does that in particular make you feel bad?
>
> A. Because, after that, you finally get processing [*sic*] and they send you to a dirty, nasty cell, a six-man cell or a five-man cell, and you're the sixth man, and you got to sleep under a bunk.

> And you think about hurting somebody. You think about – you're bigger than that guy that's got a bunk, and you want to take him off the bunk and smash him down and take his bunk, but, you know, why you have to do this? Why should I have to go through that? You think about that, and it just tears you up inside.
>
> And then you sleep on the floor and your back hurts and you're in pain. . . . You can't do nothing. You feel like you're just in a bad nightmare, like a – you know, they used to talk about prisons in other countries, but that's right here in Los Angeles County jail, the same conditions.

Pet.App. 23-24. Vermin and roaches were observed on a daily basis by Mr. Gipson. The bedding he was provided with was wet, the rooms on whose floors he slept were "molded [*sic*] and mildewed." Mr. Gipson believed that a staphylococcus infection on his left heel that required hospitalization was contracted from standing water on the cell floor on which he was required to sleep. Pet.App. 25 n. 7. Mr. Gipson's floor-sleeping experiences exemplify the conditions decried in *Hoptowit,* including exacerbating any propensity for violence. *Id.* at 1248-49.

Mr. Thomas, a post-conviction inmate, Pet.App. 25, fared no better. Forced to sleep on the floor of a day room that was "very crowded," in which inmates' mattresses were crammed together with "only ten inches between my mattress and the mattress of another inmate," *ibid,* the only place Mr. Thomas

could find to place his mattress was "under a stairway leading up to a second tier which housed suicidal inmates." *Ibid.* Unsanitary conditions were also reported by Mr. Thomas, who developed "chronic back and shoulder pain during the period he was forced to sleep on the floor." Pet.App. 25-26, n. 8.

These descriptions of floor-sleeping as it was practiced by the petitioner in the LASD Jail facilities during the class period are in sharp contrast with the petitioner's claim that the district court's order rested on a "blanket rule" that "if the inmate does not have a bunk there is a constitutional violation regardless of the specific nature and overall quality of the inmate's sleeping arrangements." (Br. 8). In fact the district court engaged in exactly the type of individualized factual inquiries necessary to "determine whether an inmate's sleeping conditions rise to the level of a constitutional violation." *Ibid.*

Because during the class period, no records of floor-sleeping were kept by the petitioner, on May 17, 2005, the district court, at respondents' request, ordered record-keeping for the period from May 29, 2005 to September 29, 2005, from which the respondents "compiled summaries of floor-sleepers in six LASD facilities." Pet.App. 13. Record-keeping during that period yielded 24,688 instances "where individuals were required to sleep on the floor." A second summary listed 5,282 individuals who were required to sleep on the floor for more than one night, the majority of whom slept on the floor between two and seven nights. *Ibid.* Thus, extrapolating from the

floor-sleeping figures uncovered by court-ordered record-keeping during that four-month period, there were at least 35,000 plus floor-sleepers who slept on the floor between two and seven nights during the class period. As petitioner concedes, the "Los Angeles County Jail processes almost 200,000 inmates per year." (Br. 7). Annualized, the 24,688 instances of floor-sleeping would amount to 74,064 instances of floor-sleeping, so that somewhat more than a third of all Jail inmates would be required to sleep on the floor for one night during the class period. However, at least during the record-keeping period, those unfortunates who slept on the floor did not do so for a single night. Moreover, it is likely that, because there was no floor-sleeping record-keeping during the class period, that inmates forced to sleep on the floor did so for much longer periods of time than the "between two and seven days" that individuals slept on the floor during the record-keeping period, when the impetus of record-keeping would have stimulated the petitioner into insuring that inmates who previously would have spent longer periods on the floor were provided with a bunk.

III. THE DISTRICT COURT'S ANALYSIS WAS NOT FLAWED NOR WAS IT INCONSISTENT WITH THIS COURT'S HOLDING IN *BELL*.

Not only is the district court's ruling that floor-sleeping is unconstitutional as practiced by petitioner in the LASD Jail in accord with Ninth Circuit

precedent, other circuits also have held arbitrary, forced floor-sleeping in the context of jail or prison overcrowding, unconstitutional. In *Lareau v. Manson,* 651 F.2d 96, 105 (2d Cir. 1981), the court held that the use of floor mattresses was "too egregious to warrant any such leeway" and "constitute[d] punishment without regard to the number of days for which a prisoner is so confined."

In *Lyons v. Powell,* 838 F.2d 28, 31 (1st Cir. 1988), the court reversed the district court's dismissal of a *pro se* pretrial detainee's claims that he was forced to sleep on a mattress on the floor for 27 days, stating:

> We are persuaded by the rulings of our sister circuits that subjecting pretrial detainees to the use of a floor mattress for anything other than brief emergency circumstances may constitute an impermissible imposition of punishment, thereby violating the due process rights of such detainees.

The court in *Lyons* also extensively analyzed the holdings of courts that have held floor-sleeping unconstitutional primarily in the context of overcrowded prisons or jails, stating:

> In *Lareau v. Manson,* 651 F.2d 96 (2d Cir. 1981), the Second Circuit held that double-bunking of pretrial detainees was constitutionally permissible for a period of no more than 15 days, but that the use of floor mattresses constituted punishment "without regard to the number of days for which a prisoner is so confined." *Id.* at 105. This

sentiment was echoed by the Third Circuit in *Union County Jail Inmates v. Di Buono,* 713 F.2d 984 (3d Cir. 1983), *cert. denied,* 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984). The court recognized that overcrowded prison conditions did not justify forcing pretrial detainees to sleep on floor mattresses for more than a few days. *Id.* at 994. The court noted that "the only condition not meeting constitutional standards [] was the practice of placing a mattress on the floor for the second occupant of a cell designed for but one inmate." *Id.* The clear implication of the court's language was that double-bunking and use of floor mattresses would only be constitutionally permissible if they were used in exigent circumstances for extremely brief periods of time. With respect to the use of floor mattresses in prisons, *see also Anela v. City of Wildwood,* 790 F.2d 1063 (3d Cir. 1986), *cert. denied*, 479 U.S. 949, 107 S.Ct. 434, 93 L.Ed.2d 384 (absence of mattresses unconstitutional in light of *Lareau* and *Union County, supra,* finding floor mattresses unconstitutional for pretrial detainees); *Inmates of Allegheny County Jail v. Wecht,* 565 F.Supp. 1278 (W.D.Pa. 1983), *aff'd. in rel. part*, 754 F.2d 120 (3d Cir. 1985) (totality of conditions at prison resulting from overcrowding, including use of floor mattresses, rose to level of constitutional violation for both pretrial detainees and inmates). *Contra Hamm v. De Kalb County,*

> 774 F.2d 1567 (11th Cir. 1985) (no punishment for detainee to sleep on floor or table temporarily so long as not required arbitrarily).

Id. at 30.

Admittedly at odds with the Ninth Circuit precedent is the Eleventh Circuit's ruling in *Hamm, supra.* In *Hamm* the court held:

> The district court likewise applied the correct standards to Hamm's claims concerning sleeping arrangements and overcrowding at the jail. The fact that Hamm temporarily had to sleep upon a mattress on the floor or on a table is not necessarily a constitutional violation. *See Crowe v. Leeke,* 540 F. 2d 740-41 (4th Cir. 1976); *cf. Bell,* 441 U.S. at 541-43, 99 S.Ct. 1875-76 (upholds the practice of "double-bunking").

Id. at 1575. In reaching its conclusion that floor-sleeping is not unconstitutional, in *Hamm* the court noted, "[t]he Supreme Court, however, has not set forth a standard for determining what level of necessities the due process clause absolutely requires." *Id.* at 1574.

The Third Circuit, in *Hubbard v. Taylor,* 538 F.3d 229 (3d Cir. 2008), employing a totality of the circumstances analysis, similarly held that floor-sleeping in the context of overcrowding did not constitute punishment and therefore was not unconstitutional. In *Hubbard,* the plaintiffs alleged that:

> they had to sleep on floor mattresses for extended periods of time as a result of triple-celling, with most spending between three and seven months on a mattress while waiting for one of the bunk beds to become available. They allege that this resulted in "extreme discomfort and disease" as well as the "regular splash[ing]" of urine and feces from the nearby toilet; moreover, two of the Plaintiffs claim to have suffered injuries as a result of the mattresses.

Id. at 234.

Nonetheless, the court in *Hubbard* held that floor-sleeping due to overcrowding that involved the triple-celling of pretrial detainees and that included one inmate sleeping on the floor on a mattress in each cell for an extended period of time, was not unconstitutional. Thus, in *Hubbard*, the court took the Court's ruling in *Bell* that double bunking was not unconstitutional, one step further.[2] In *Hubbard* the court justified its holding that triple-celling, with a third inmate sleeping on the floor, was not unconstitutional based on the Court's statement in *Bell* that, because the detainees' rooms

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[2] Or, perhaps, backwards, for certainly concluding that forced floor-sleeping due to overcrowding is sanctioned by *Bell* is the antithesis of this Court's holding in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

> "provide more than adequate space for sleeping," 441 U.S. at 543, 99 S.Ct. 1861, it thus 'fail[ed] to understand the emphasis . . . on the amount of walking space' in the cells." *Id.* at 543 n. 26, 99 S.Ct. 1861.

Many of the cases gang-cited by the petitioner have nothing to do with arbitrary floor-sleeping in the context of prison or jail overcrowding. (Br. 8 & 11). *Tesch v. County of Green Lake,* 57 F.3d 465 (7th Cir. 1998), is a salient example. In *Tesch,* the wheelchair bound plaintiff who was afflicted with muscular dystrophy spent 44 hours in a cell that was outfitted for disabled individuals, complete with a bed that was permanently affixed to the floor, consist[ing] of a steel platform on steel legs with a removable mattress on top . . . [that] was positioned in the cell to provide maximum clearance for wheelchairs." *Id.* at 469. Because no grab bars were installed by the bed, and guards refused to help the plaintiff onto the bed, he was forced to pull the mattress off the bed and sleep on the floor. *Ibid.* However, the callous, deliberate indifference of a few individual guards during a period that the court in *Tesch* held was not of a sufficiently long duration to amount to a form of punishment, *id.* at 476, is scarcely analogous to a system-wide custom and practice of causing floor-sleeping in Bedlam-like conditions due to overcrowding. Also inapposite but cited by petitioner (Br. 8 & 11) are the cases of *Peterkin v. Jeffes,* 855 F.2d 1021 (3d Cir. 1988) (broad-ranging conditions of confinement class action brought by death row prisoners that primarily centered around the amount of time (22 hours) the

death row inmates spent in their cells, and access to the library and to legal counsel); *Jones v. Barnes*, 198 Fed. Appx. 756 (4th Cir. 2006) (an unpublished *per curiam* opinion that specifically states that unpublished opinions are not precedent in the Fourth Circuit that merely summarily affirmed the district court's order "on the modified ground that Jones failed to state a claim for improper prison conditions and medical mistreatment." *Id.*); *Ferguson v. Cape Girardeau County*, 88 F.3d 648, 650 (8th Cir. 1996) (pretrial detainee plaintiff's 13 days of floor-sleeping with a mattress was the result of his being placed in a vestibule where he was under constant observation, both to monitor his medical condition [he had been complaining of chest pain] and because he was perceived to be dangerous); *Paige v. Hudson*, 341 F.3d 642 (7th Cir. 2003) (whether plaintiff's removal from a home detention program into jail deprived him of a liberty interest.).

Indisputably, *Hamm* and its progeny create a circuit conflict on this important matter. However, the law in the Ninth Circuit was clearly established that arbitrary, forced floor-sleeping caused by overcrowding in the jail/prison setting is unconstitutional, and the Ninth Circuit was well within its discretion in denying petitioner's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

For the reasons set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

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